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Supreme Court, U.S.
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No. —

In The

Supreme Court of the United States

AMANDO GAMBOA-MOLINA,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

On Petition for Writ of Certiorari To The Supreme Court of the State of Arizona

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where a defendant has made the required preliminary but substantial showing of misrepresentation or material omission in a wiretap application, can the Government avoid an evidentiary hearing under *Franks v. Delaware* with respect to an application for a wiretap simply by purportedly "effectively countering" the showing in a written reply?

2. Should this Court accept certiorari to resolve a split among the Courts as to the quantum of pleading required before a trial court is required to resolve factual disputes regarding a wiretap application in an evidentiary context?

PARTIES TO PROCEEDING

Petitioner is Amando Gamboa-Molina, Defendant in the Arizona Superior Court, Appellant in the Arizona Court of Appeals and Petitioner in the Arizona Supreme Court.

Respondent is the State of Arizona, Plaintiff and prosecuting party in the Arizona Superior Court, Appellee in the Arizona Court of Appeals and Respondent in the Arizona Supreme Court.

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

In *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), this Court held that where a criminal defendant makes a "substantial preliminary showing" that an affidavit in support of a search warrant under the Fourth Amendment was made with "deliberate falsehood or [a] reckless disregard for the truth," the defendant is entitled to an evidentiary hearing to test this showing. *Id.* at 170-72, 98 S.Ct. at 2684-85. The relationship between *Franks* hearings and law enforcement requests for wiretaps is well established. *See, e.g.*, "Electronic Surveillance," 37 GEO. L.J. ANN. REV. CRIM. PROC. 133, 135 (2008) ("Both the Fourth Amendment and Title III require that certain procedures be followed when law enforcement officials conduct electronic surveillance"). However, lower courts divurge over the quantum of pleading that is required to trigger the *Franks* evidentiary hearing.

In this matter, the Arizona Court of Appeals (the final court issuing a reasoned decision in this matter) did not contest that Mr. Gamboa-Molina had made a "substantial preliminary showing" that other investigative techniques were available to the officers seeking a wiretap, and that the officers had not disclosed the availability of these techniques to the judge issuing the wiretap order. However, the

Court of Appeals held that the State had "effectively countered" Mr. Gamboa-Molina's substantial showing in its written response and, therefore, was not entitled to a *Franks* evidentiary hearing.

In contrast, other courts, such as the United States Court of Appeals for the Ninth Circuit, have held that a defendants' burden at the pleading stage challenging a wiretap application is simply to make a "preliminary showing that the wiretap applications contained material misrepresentations or omissions." *United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1110-1111 (9th Cir. 2005), *amended on denial of reh'g*, 437 F.3d 854 (9th Cir. 2006). "Our case law does not require clear proof of deliberate or reckless omissions or misrepresentations at the pleading stage." *Id.*

No other court in the country has adopted the Arizona Court of Appeals' "effectively countered" standard for reviewing a motion for a *Franks* hearing, completely denying the opportunity to cross-examination where a defendant has made a sufficient showing to require the State to engage in such "effective" countering. As noted below, cross-examination would have, in fact, revealed the fatal flaws in the State previously unargued contentions. Thus, for the reasons set forth herein, Defendant-Petitioner Amando Gamboa-Molina respectfully requests that this Court grant his petition for writ of certiorari in this matter, consider the merits of the claim, and grant relief accordingly.

DECISIONS BELOW

The Superior Court of the State of Arizona, Maricopa County, denied Defendant-Petitioner's Motion To Suppress The Fruits Of Electronic Surveillance and Search Warrants and Request For Hearing Pursuant to *Franks v. Delaware* in a minute entry dated July 17, 2007. *App 17-20.* Thereafter, on March 4, 2008, the trial court found Mr. Gamboa-Molina guilty of the offenses for which he was charged following a bench trial on stipulated facts.

The Arizona Court of Appeals affirmed the denial of a *Franks* hearing (and, thus, affirmed Mr. Gamboa-Molina's convictions) in a memorandum decision dated September 1, 2009. *App 3-16.* Mr. Gamboa-Molina had identified five specific avenues of investigation that law enforcement could have, and should have, pursued prior to submitting the wiretap application, avenues that the averring officers did not discuss in their wiretap application. *App 10-11.* In upholding the denial of a *Franks* hearing, the Court of Appeals held that, notwithstanding Mr. Gamboa-Molina's clear specification of these five separate avenues of investigation, that the State had "effectively countered" the claims in its written submissions and, therefore, Mr. Gamboa-Molina did not even have the right to an evidentiary hearing or opportunity to cross-examine the officers on their written claims. *App. 11.*

The Arizona Court of Appeals denied Mr. Gamboa-Molina's petition for review in a one-page letter decision on March 4, 2010.

JURISDICTION

The Arizona Supreme Court denied Defendant-Petitioner's petition for review on March 4, 2010. *App. 1-2.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Arizona Revised Statutes section 13-3010(A) and (B):

> A. On application of a county attorney, the attorney general or a prosecuting attorney whom a county attorney or the

attorney general designates in writing, any justice of the supreme court, judge of the court of appeals or superior court judge may issue an ex parte order for the interception of wire, electronic or oral communications if there is probable cause to believe both:

1. A crime has been, is being or is about to be committed.

2. Evidence of that crime or the location of a fugitive from justice from that crime may be obtained by the interception.

B. An application under subsection A shall be made in writing and upon the oath or affirmation of the applicant. It shall include:

1. The name and title of the applicant.

2. A full and complete statement of the facts and circumstances relied upon by the applicant, including the supporting oath or affirmation of the investigating peace officer of this state or any political subdivision of this state to justify the officer's belief that

an order should be issued. The statement shall include:

(a) Details as to the particular crime that has been, is being or is about to be committed.

(b) The identity of the person, if known, committing the offense and whose communications are to be intercepted.

(c) A particular description of the type of communications sought to be intercepted.

(d) A particular description of the nature, identification and location of the communication facility from which or the place where the communication is to be intercepted. If the identification or specific description of the communication facility from which or the place where the communication is to be intercepted is not

practical, the affidavit in support of the application must state why:

(i) Specification is impractical.

(ii) Interception from any facility or at any place where the communication may occur is necessary.

3. A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.

4. A statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that authorization to intercept should not automatically terminate when the described type of communication has been first obtained, the statement shall include a particular description

of facts establishing probable cause to believe that additional communications of the same type will occur after the communication has been first obtained.

5. A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each application.

6. If the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

STATEMENT OF THE CASE

Following the completion of a four-month long major wiretap investigation ("CWT-264") directed at a individual known as Adrian Barraza-Mendoza, a Phoenix-based joint law enforcement task force submitted an application to the Maricopa County Superior Court for a second wiretap investigation directed at the same individual, Mr. Barraza-Mendoza, Wiretap Investigation CWT-269. *App 54-56.* In seeking the wiretap order, the officers relied on essentially the same obstacles to "traditional" investigative techniques as they did in their initial wiretap investigation.

In his motion for a *Franks* hearing, Mr. Gamboa-Molina provided specific details as to investigative techniques that the officers could have, and should have, undertaken prior to seeking a wiretap, and demonstrated a colorable basis to show that these investigative techniques had been willfully or recklessly omitted from the wiretap application, the trial court refused to grant Mr. Gamboa-Molina an evidentiary hearing under *Franks*. *App. 26-28, 30, 40-49, 64-69.* The trial court accepted the State's claims that these other investigative techniques would not have worked. Thus, the officers' claims in their affidavits were never subjected to the test of cross-examination.

In *Franks*, this Court held that a defendant's obligation at the motion stage under its decision was

to make a "preliminary," albeit "substantial," showing that the affidavit was false or misleading, and that the misstatement or omission was material. Satisfying this obligation, the defendant was entitled to an evidentiary hearing. *Franks*, 438 U.S. at 155-56, 98 S.Ct. at 2676 ("[W]e hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request"). "Clear proof of deliberate or reckless omission is not required," as "[s]uch proof is reserved for the evidentiary hearing." *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir.), *as amended by* 769 F.2d 1410 (1985). "At this [pleading] stage, all that is required is that the defendant make a substantial showing that the affiant intentionally or recklessly omitted facts required to prevent technically true statements in the affidavit from being misleading." *Id.*

The Arizona Court of Appeals' addition of an "effective countering" step at the pleading stage, with no ability to respond to the "countering" by cross-examination by the defendant, is unprecedented. Thus, Defendant-Petitioner Amando Gamboa-Molina respectfully requests that this Court grant *certiorari* in this matter.

PROCEEDINGS BELOW

Law enforcement officers arrested Mr. Gamboa-Molina on June 2, 2006, and a grand jury subsequently indicted Petitioner Gamboa-Molina on 25 counts of a 417-count indictment on August 17, 2006.[1]

On March 29, 2007, Mr. Gamboa-Molina, through counsel, filed a motion to suppress/*Franks* motion. *App. 56-71.* Following varying responses and replies regarding the *Franks* motion, the trial court, the Arizona Superior Court for Maricopa County, denied Mr. Gamboa-Molina's request for an evidentiary hearing, but conducted oral argument on the *Franks* issue. On July 17, 2008, the trial court denied Mr. Gamboa-Molina's *Franks* motion. *App 17-18.*

The trial court conducted a bench trial on the charges against Mr. Gamboa-Molina and others named in the indictment commencing on February 12, 2008. On March 4, 2008, the trial court found Mr. Gamboa-Molina guilty on all counts in which he was named. *See App. 7.*

Mr. Gamboa-Molina filed a timely appeal to the Arizona Court of Appeals., raising only issues surrounding the denial of a *Franks* hearing before the appellate court. Following briefing, the Arizona

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[1] Three counts were subsequently dismissed prior to trial. *See App. 6.*

Court of Appeals affirmed Mr. Gamboa-Molina's conviction in an unpublished memorandum decision dated September 1, 2009. *App 3-20.* Mr. Gamboa-Molina filed a timely petition for review to the Arizona Supreme Court, which was denied by letter order on March 4, 2010. *App 1-2.*

FACTUAL BACKGROUND

In the summer or early fall of 2005, a joint task law enforcement task force, consisting of officers from the Phoenix Police Department and federal Drug Enforcement Agency, began investigating an individual known as Adrian Barraza-Mendoza, a person they suspected of trafficking in large quantities of both cocaine and methamphetamine. *See App. 58.* In October of 2005, the task force sought and received a wiretap as part of their investigation, Wiretap Investigation No. CWT-264. This wiretap was in place through December of 2005. *Id.*

Following the expiration of Wiretap CWT-264, investigators sought and received permission for a second wiretap investigation, Wiretap Investigation No. CWT-269. Using the information from this second wiretap, investigators arrested Mr. Barraza-Mendoza on May 12, 2006. *App. 38.*

However, even following their arrest of Mr. Barraza-Mendoza, the primary target of the investigation, the investigators continued their use

of Wiretap CWT-269. On June 2, 2006, investigators used information obtained from CWT-269 to arrest Defendant-Petitioner Amando Gamboa-Molina, charging him with a variety of narcotics trafficking offenses. *App. 39.*

On March 29, 2007, Mr. Gamboa-Molina and a co-defendant filed a Joint Motion To Suppress The Fruits Of Electronic Surveillance And Search Warrants And Request For Hearing Pursuant To *Franks v. Delaware, App 56-71*, a supplement to this motion on April 13, 2007, *App. 37-55*, and a reply on May 25, 2007, *App. 25-36.* Mr. Gamboa-Molina provided five separate bases for this claim that the Government's affidavit in support of its wiretap was materially deficient with respect to the "necessity" of a wiretap:

1. *Pole Cameras*: There were two primary locations targeted by the investigation, Mr. Barraza-Mendoza's residence at 11226 W. Calle De La Luna in Glendale, Arizona, and "Chuy's" apartment located at 6901 W. McDowll Road, No. 8905, in Phoenix. Mr. Gamboa-Molina noted that a pole camera at both residences would have provided a clear view of the front door to the locations and, with respect to Chuy's apartment, would have enable

the officers to observed both the apartment, covered parking in front of the apartment, and the community trash dumpster, enabling effective "trash runs." *App. 64-65.* Photographs of Mr. Barraza-Mendoza's residence and Chuy's apartment, showing the location of relevant poles, were attached to Mr. Gamboa-Molina's supplement. *App. 53-55.*[2]

2. *Informants and Undercover Operations:* After an earlier wiretap investigation, the investigators undoubtedly obtained the names of potential informants that could be used to help infiltrate the drug trafficking network. Moreover, the Government never explained why the use of undercover officers was impractical or unreasonable as an investigative tool in this case. *App. 66.*

Mr. Gamboa-Molina identified multiple potential informants that the Government could have,

[2] Due to the low quality of the photographs in possession of appellate counsel, the actual photographs are not included in the Appendix to this Petition.

and should have, considered, and failed to include in their affidavits. For example, on May 8, 2006, investigators arrested two co-conspirators or traffickers with ties to Barraza-Mendoza, Maria Guadalupe Coronel-Villapuda and Margarito Echeveria-Ibarra, individuals who had been asked to transport over $100,000.00 to Mexico for Barraza-Mendoza. Neither was asked to inform, interrogated, but simply released after identified for future use. *App. 47-48.*

Similarly, in January of 2006, another trafficker with potential ties to Barraza-Mendoza, L.V., began cooperating with law enforcement officials. L.V. was actually a target in CWT-264. However, L.V.'s cooperation was never revealed in the application for CWT-269. *App. 27-28.*

3. *Trash Runs*: The investigators conducted only two trash runs, one at each location in February of 2006. One trash run per location was hardly a fair test to

determine whether such technique would have produced meaningful information. Moreover, "trash runs" done in conjunction with pole cameras, to see who was throwing away the trash and to collect it soon after the dumping (particularly with respect to the community dumpster in the Chuy apartment complex), would have resulted in meaningful trash runs, eliminating the need for the second, invasive wiretap investigation. *App. 66-67.*

4. *Grand Jury Investigations and Search Warrants.* Prior to seeking the wiretap that led to Mr. Gamboa-Molina's arrest, the task force had already completed a two-month wiretap investigation, CWT-264. Presumably this investigation provided considerable information and leads; otherwise, the officers would have lacked any substantial basis for proceeding with the second wiretap investigation, CWT-269. Nonetheless, the law enforcement officers at this point

did not convene a grand jury (with its powers of subpoena) or execute search warrants on locations uncovered in investigation CTW-264. Rather, they proceeded with a second, intrusive wiretap investigation. *App. 68.*

5. *GPS Tracking:* The officers admitted that the use of a GPS tracking device was highly successful in determining locations frequented by Chuy. However, the State never utilized such devices for vehicles associated with Mr. Barraza-Mendoza, even though only three vehicles were linked to his residence. GPS devices on these vehicles presumably would have also resulted in invaluable information and, if coupled with a pole camera, the officers could have determined which vehicle was used when and by whom even before installation of a GPS device, plus establish if there were other vehicles for which such a device should be installed. *App. 68 69.*

Mr. Gamboa-Molina also noted that the task force's affidavit was misleading due to its claim that analysis of telephone records yielded "fictitious" addresses. *App. 40-41.* However, as Mr. Gamboa-Molina noted in his Supplement, several of these addresses were real, had legitimate subscriber information, or were at least susceptible to trash runs and other traditional investigation techniques. *Id.*

Finally, Mr. Gamboa-Molina provided the identity and substance of an expert witness, former DEA agent Gregory Salazar, who would testify at the evidentiary hearing about the law enforcement agents' misleading affidavit. Specifically, the offer of proof stated that Mr. Salazar would testify that the officers

> misled Judge Ishikawa by: 1. Misrepresenting the limited use of pole cameras at both the Calle de La Luna residence and McDowell Road apartments; 2. misrepresented the addresses found or not found via public records which were subject to normal investigative procedures; and 3. failed to advise Judge Ishikawa. Ms. Vera was "a major distributor of methamphetamine in the Metro-Phoenix area" and cooperating with law enforcement authorities with ties to the

> targets of the investigation in CWT-269.

App 32.

This offer of proof, including photographs and portions of the affidavit for CWT-264, was not merely "conclusory." It contained specific facts and allegations, sufficient to warrant an evidentiary hearing under the standards set forth in *Franks*. However, the Arizona Court of Appeals' conclusion that such specific allegations could be "effectively countered" by the Government without any meaningful testing by cross-examination or testimony or evidence at an evidentiary hearing in unprecedented, and contrary to *Franks* and its progeny.

REASONS FOR GRANTING THE WRIT

1. The Arizona Court of Appeals' Creation Of An "Effective Countering" Pleading Step Before An Evidentiary Hearing Could Be Granted In Unprecedented and Contrary To Both *Franks* And Its Progeny.

"The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 683 (1961). Governmental invasion of a home is perhaps at its zenith when it enters a home to listen into the private conversations of its residents over a telephone. Thus, when Congress entered the field in 1968, enacting the Electronic Communications Privacy Act ("ECPA") amended Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522, its "paramount objective" was to "protect effectively the privacy of communications." *In re Pharmatrak*, 329 F.3d 9, 18 (1st Cir. 2003). "The limitations in the wiretap statute reflect a societal determination that the threat to liberty inherent in audio surveillance requires that this intrusive investigative technique

be permitted only in limited circumstances." *United States v. Nerber*, 222 F.3d 597, 605 (9th Cir. 2000). Thus, "[t]he procedural steps provided in the Act require strict adherence," and "utmost scrutiny must be exercised to determine whether wiretap orders conform to [the statute]." *United States v. Blackmon*, 273 F.3d 1204, 1207 (9th Cir. 2001).

Thus, the requirements for issuance of a wiretap in the ECPA are effectively intertwined with the requirements of the Fourth Amendment. *See United States v. Flores*, 2007 WL 2904109 (N.D. Ga. 2007) ("the Fourth Amendment requires the Court to hold a hearing to determine the admissibility of the evidence gathered based on the wiretap"); "Electronic Surveillance," 37 GEO. L.J. ANN. REV. CRIM. PROC. 133, 135 (2008) ("Both the Fourth Amendment and Title III require that certain procedures be followed when law enforcement officials conduct electronic surveillance"); *accord United States v. Koyomejian*, 970 F.2d 536, 542 (9th Cir. 1992) ("We 'look to Title [I of the ECPA] for guidance in implementing the fourth amendment in an area that Title [I] does not specifically cover'") (quoting *United States v. Mesa-Rincon*, 911 F.2d 1433, 1438 (10th Cir.1990)). The Fourth Amendment provides searches and seizures generally require a warrant issued "upon probable cause." **U.S.Const. Amend. IV**. Moreover, as this Court held in *Franks, supra,* a warrant alone will not justify a search or seizure if the factual basis for the warrant was the product of intentional or

reckless misstatements or omission. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). If a criminal defendant makes a "substantial preliminary showing" that an affidavit in support of a search warrant under the Fourth Amendment was made with "deliberate falsehood or [a] reckless disregard for the truth," the defendant is entitled to an evidentiary hearing to test this showing. *Id.* at 170-72, 98 S.Ct. at 2684-85.

Courts have routinely applied the *Franks* standard and requirement for an evidentiary hearing to affidavits in support of wiretaps. *United States v. Staves*, 383 F.3d 977, 982 (9th Cir. 2004) ("A defendant is entitled to a *Franks* hearing if he makes a substantial preliminary showing that a false statement was deliberately or recklessly included in an affidavit submitted in support of a wiretap order. . . "); *United States v. Green*, 175 F.3d 822, 828 (10th Cir.1999) ("The application and affidavit for wiretap authorization are subject to the requirements of *Franks v. Delaware*"); *see also United States v. Cartagena*, 593 F.3d 104, 112 (1st Cir. 2010) (applying *Franks* to wiretap application matter but finding that defendant had failed to satisfy *Franks* requirement for an evidentiary hearing). To survive statutory and constitutional scrutiny, an affidavit in support of a wiretap application must demonstrate that "there is a genuine need for [the wiretap] and only to the extent that it is needed," *Dalia v. United States*, 441 U.S. 238, 250, 99 S.Ct. 1682, 1689-90 (1979), generally

described as the "necessity requirement," *United States v. Zapata*, 546 F.3d 1179, 1186 (10th Cir. 2008). "Evidence obtained through a wiretap order that does not meet the necessity requirement must be suppressed." *Id.*

The issue presented in this case is the "pleadings" requirement necessary to trigger the obligation to conduct the *Franks* evidentiary hearing. The *Franks* Court itself stated the test as follows: "[W]e hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Franks*, 438 U.S. at 155-56, 98 S.Ct. at 2676.

The seminal case construing *Franks'* pre-hearing pleading requirement is *United States v. Stanert*, 762 F.2d 775 (9th Cir. 1985). "Clear proof of deliberate or reckless omission is not required," as "[s]uch proof is reserved for the evidentiary hearing." *Id.* at 781. "At this [pleading] stage, all that is required is that the defendant make a substantial showing that the affiant intentionally or recklessly omitted facts required to prevent technically true statements in the affidavit from being misleading." *Id.*; *see also United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1111 (9th Cir. 2005)

(same, as applied in a wiretap case); *United States v. Brown*, 298 F.3d 392, 408 (5th Cir. 2002) (same). In short, a *Franks* motion is much like a summary judgment proceeding in the civil context; once a defendant demonstrates an issue of material fact, the matter must proceed to trial. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 331, 106 S.Ct. 2548, 2557 (1986).[3]

Gonzalez, Inc. illustrates these principles. Although the Government had used numerous traditional investigative techniques in its investigation of an alien-smuggling operation, including video surveillance, undercover agents, physical stakeouts, and confidential informants, the defendants asserted that more of the same was adequate to continue the investigation, and that a wiretap was unnecessary. *Gonzalez, Inc.*, 412 F.3d at 1110-11. Specifically, the defendants asserted that the Government, in its wiretap application had

> (1) misrepresented the limited use of pole cameras in this investigation; (2) misrepresented that further physical

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[3] This Court has addressed the adequacy of pleading standards in a variety of contexts in recent years. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. ----, ----, 129 S.Ct. 1937, 1946 (2009) (standard for pleading in civil complaints); *Scott v. Harris*, 550 U.S. 372, 377, 127 S.Ct. 1769, 1774 (2007) (defining what constitutes a "genuine" issue of material fact in summary judgment context).

> surveillance was highly likely to be compromised; (3) inaccurately portrayed the government's CIs as having less access to GST's key officers than they actually possessed; and (4) misrepresented the ability of the government to place an undercover agent in the Blake Avenue office.

Id. These claims, supported by documentation, were sufficient, the Ninth Circuit held, to trigger an evidentiary hearing. *Id.* at 1111. The Government's responses to these substantial and supported claims were properly subjects for the evidentiary hearing. *Id.*

Applying the *Gonzalez, Inc.* pleading standard to the present matter, the trial court would have been obligated to conduct an evidentiary hearing on Mr. Gamboa-Molina's request. His allegations of material misstatements and omissions were equally, if not more significantly, specific and clear than those in *Gonzalez, Inc.* Mr. Gamboa-Molina demonstrated the specific poles where cameras could be placed. He provided the specific names of individuals who were potential informants. He demonstrated that the law enforcement officers had the results from a prior wiretap investigation from which to develop leads. He showed that several addresses identified by the officers as "fictitious" were, in fact, legitimate addresses that could have been investigated and surveiled.

However, the Arizona Court of Appeals escaped the reasoning of *Franks* and *Gonzalez, Inc.* by adding a new step to the *Franks'* pleading stage, namely, that if the Government merely alleges "effective counters" to the defendants' specific claims, then an evidentiary hearing is no longer required. *App 11.* For example, the Arizona appellate court concluded that the State's response that it rented another apartment near that of Chuy's "countered" the use of pole cameras; Mr. Gamboa-Molina was never able to cross-examine the officers on how an apartment, with limited views and the need for 24/7 staffing (unlike an ever-present camera) was a better alternative than pole cameras. The State claimed that one of the statements regarding a "fictitious' addressed that turned out to be legitimate was a "honest" mistake; again, Mr. Gamboa-Molina was not permitted to cross-examine the officer about this "honest" mistake, as opposed to whether it was made in reckless disregard for the truth or intentionally.

The differing standards between the Arizona Court of Appeals and the federal appellate courts, standing alone, warrants this Court consideration of this important issue of Fourth Amendment jurisprudence. The fact that these differing standards exist within the same federal circuit is particularly compelling. As a Pennsylvania appellate court observed, differing standards within the same geographic boundaries enable a litigant to

"improperly 'walk across the street' to achieve a different result in federal court than would be obtained in state court." *Werner v. Plater-Zyberk*, 799 A.2d 776, 782 (Pa.Super. 2002) (citation and quotation omitted).

CONCLUSION

The standard for pleading is the front door to access to the courts. Differing pleading standards ultimately bear on the substantive application of the Fourth Amendment to wiretap issues, determining what issues even become eligible for resolution on the merits. Accordingly, for the reasons set forth herein, Petitioner respectfully requests that this Court grant his petition for writ of certiorari in this matter.

RESPECTFULLY SUBMITTED this 1st day of June, 2010.

/s/
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Counsel of Record

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SUPREME COURT
STATE OF ARIZONA
402 Arizona State Courts Building
1501 West Washington Street
Phoenix, Arizona 85007-3231

Telephone: (602) 452-3396

Rachelle M. Resnick
Clerk Of The Court

Suzanne D. Bunnin
Chief Deputy Clerk

March 4, 2010

RE:
STATE OF ARIZONA v. AMANDO GAMBOA-MOLINA
Arizona Supreme Court No. CR-09-0281-PR
Court of Appeals Division One No. 1 CA-CR 08-0231
Maricopa County Superior Court No. CR2006-008681-011 DT

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 2, 2010, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 4th day of March, 2010.

Rachelle M. Resnick, Clerk

TO:
Julie A Done
Bruce E Blumberg
Amando Gamboa-Molina, ADOC# 227424, Arizona State Prison, Diamondback Correctional Facility
Philip G. Urry
ade

Court of Appeals file stamp
Filed: 9-1-2009

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-0231
	)	DEPARTMENT A
Appellee,	)	
	)	**MEMORANDUM**
v.	)	**DECISION**
	)	(Not for
AMANDO	)	Publication --
GAMBOA-MOLINA,	)	Rule 111,
	)	Arizona Supreme Court
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County
Cause No. CR2006-008681-011 DT
The Honorable Thomas W. O'Toole, Judge, Retired

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Julie A. Done, Assistant Attorney General
Attorneys for Appellee

Blumberg & Associates Phoenix
By Bruce E. Blumberg
Attorneys for Appellant

T H O M P S O N, Judge

¶1 Defendant, Amando Gamboa-Molina, appeals from his convictions based on his possession of methamphetamine, cocaine, and crack cocaine over the threshold amounts for sale; conspiracy; illegally conducting an enterprise; illegal use of a wire communication in a drug related transaction; misconduct involving a weapon; money laundering; and possession of drug paraphernalia. On appeal, he argues (1) that the trial court erred by not holding a *Franks* hearing[1], and (2) that, as a consequence, the court abused its discretion in denying his motion to suppress wiretap evidence. For the reasons set forth below, we affirm.

---

[1] *Franks v. Delaware*, 438 U.S. 154, 171-172 (1978).

FACTS[2] AND PROCEDURAL EVIDENCE

¶2 The state charged defendant with numerous felony offenses as the result of an investigation by the U.S. Drug Enforcement Administration (DEA) and the Conspiracy Squad of the Phoenix Police Department Drug Enforcement Bureau. The initial investigation began with two individuals, Adrian Barraza-Mendoza and Jesus Antonio Velarde. In March 2006, Phoenix police and the DEA applied for and were granted authorization by Maricopa County Superior Court for CWT-269 to tap the telephone of Barraza-Mendoza, whom they believed dealt primarily in cocaine and large quantities of methamphetamines on occasion. The investigation eventually revealed that defendant was a part of the drug trafficking operation.

¶3 When defendant was taken into custody, he was in possession of: approximately $270,000 in U.S. currency; more than 80 pounds of cocaine, 31 pounds of it in kilos, as well as 150 grams of crack cocaine; various weapons and ammunition; a cell phone that was intercepted as part of the wiretap investigation; and drug paraphernalia such as digital scales,

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[2] On appeal, we view the facts in the light most favorable to sustaining the convictions. *State v. Haight-Gyuro*, 218 Ariz. 356, 357, ¶ 2, 186 P.3d 33, 34 (App. 2008).

shrink wrap, cutting agents, and hundreds of ziplock bags.

¶4 Before trial, the state moved to dismiss three of the counts against defendant without prejudice. The motion was granted and the original indictment was amended and renumbered as follows: one count of conspiracy, a Class 2 felony (Count 1); one count of illegally conducting an enterprise, a Class 3 felony (Count 2); five counts of use of a wire communication (telephone) in a drug related transaction, each a Class 4 felony (Counts 3, 10, 13, 14, 15); four counts of money laundering, each a Class 3 felony (Counts 4, 12, 27, 30); one count of transportation for sale, sale or transfer of a dangerous drug (methamphetamine) over the threshold amount, a Class 2 felony (Count 11); one count of possession for sale of a dangerous drug (methamphetamine) over the threshold amount, a Class 2 felony (Count 18); four counts of possession for sale of a narcotic drug (cocaine) over the threshold amount, each a Class 2 felony (Counts 22, 24, 25, 29); one count of possession for sale of a narcotic drug (crack cocaine) over the threshold amount, a Class 2 feony (Count 23); two counts of misconduct involving a weapon, each a Class 4 felony (Counts 26, 31); and two counts of possession of drug paraphernalia, each a Class 6 felony (Counts 28 and 34).

¶5 Prior to trial, defendant moved to suppress all of the evidence obtained against him via the wiretap and requested a Franks hearing. In response, the

state argued that the wiretap was necessary, the evidence obtained was admissible and it moved to vacate the Franks hearing arguing that defendant failed to meet the requisite burden to establish a Franks hearing was needed. After considering all of the pleadings, the trial court vacated the Franks hearing. It subsequently heard oral argument on defendant's motion to suppress and denied that motion as well.

¶6 Defendant waived his right to a jury trial, preserving his right to appeal on the suppression issues, and the case was submitted to a bench trial based on a stipulated factual summary and accompanying exhibits. Defendant was convicted of all of the offenses charged in the amended indictment and sentenced to concurrent, presumptive prison terms of 10 years flat time on Count 11; 5 years on Counts 1, 22, 23, 24, 25, and 29; 3.5 years on Counts 2, 4, 12, 27, and 30; 2.5 years on Counts 3, 10, 13, 14, 15, 26, and 31; 1 year on Counts 28 and 32. The court also sentenced defendant to a presumptive 10 year prison term, flat time, to run consecutive to Counts 1 through 4, 10 through 15, and 22 through 32. Defendant timely appealed.

DISCUSSION

Denial of Franks Hearing

¶7 Prior to trial, defendant filed a motion to suppress all of the evidence obtained through the

wiretap in which he also requested a Franks hearing. In his motion, defendant argued that the "necessity requirement" of Arizona Revised Statutes (A.R.S.) § 13-3010 (2001) had not been met because the state had presented misleading or inaccurate information in the supporting affidavit and therefore misled the court in approving the authorization. The state responded by pointing out the inaccuracies in defendant's rendition of the facts as stated in the application for the original authorization CWT-269 and by arguing that defendant, therefore, had failed to make a substantial preliminary showing that a Franks evidentiary hearing was required.

¶8 The trial judge agreed with the state, and vacated the Franks hearing finding defendant had "failed to make a substantial preliminary showing that the affidavits knowingly or intentionally misled the issuing judges or contained reckless statements or omissions, and failed to show that the falsehoods or omissions were necessary to the finding of probable cause and the issuance of the wiretaps." In denying the motion to suppress, the trial court found the state's "affidavit fully complied with the necessity requirement, and the wiretap order was proper." We find no error in either the trial court's vacating the *Franks* hearing or in denying the motion to suppress the wiretap evidence.

¶9 The so called "necessity requirement" derives from the directive of A.R.S. § 13-3010(B)(3), which dictates that an application for a wiretap be made

under "oath or affirmation of the applicant" and contain "[a] full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." Pursuant to Franks, if a defendant makes a substantial preliminary showing that a false or misleading statement was made intentionally or knowingly or with reckless disregard for the truth, and the statement was necessary to the finding of probable cause and the issuance of the authority for the wiretap, he is entitled to an evidentiary hearing to explore the alleged falsehoods. 438 U.S at 171-72. Defendant bears the burden of proof and is required to make a substantial showing as to both elements. *United States v. Chavez-Miranda*, 306 F.3d 973, 979 (9th Cir. 2002). "Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained." *Franks*, 438 U.S. at 171.

¶10 On appeal from the denial of a motion to suppress, a reviewing court reviews the record to make an independent determination of whether a wiretap application contains a full and complete statement of the facts necessary to satisfy the statutory requirement. *United States v. Carneiro*, 861 F.2d 1171, 1176 (9th Cir. 1988); *see also, State v. Bolt*, 142 Ariz. 284, 287-88, 689 P.2d 543, 546-47 (App. 1983). A trial court's "necessity" determination is held to an abuse of discretion standard; the

underlying factual findings concerning misleading statements or omissions are reviewed under a clearly erroneous standard. *Carneiro*, 861 F.2d at 1176.

¶11 In his motion challenging the state's "necessity" showing, defendant contended that the state had misled the issuing judge with regard to five claims made by the officers in their affidavit for a wiretap of Barraza-Mendoza and an operant known to them at the time as "Chuy." Specifically:

> (1) Pole Cameras: Defendant maintained that the officers misled the court when they stated that pole cameras were insufficient investigative tools because they provided only a limited view of the Barraza-Mendoza residence and would be of no assistance with regard to Chuy because he lived in an apartment complex;
>
> (2) Confidential Informants: Defendant argued that the officers employed "boilerplate" language regarding the non-use of informants or undercover officers and that there was no evidence that they had asked any suspects if they would be willing to act as informants and penetrate the drug operation. Defendant suggested several

suspects whose assistance the officers might have solicited;

(3) Trash Runs: Defendant noted that the officers had only conducted two unsuccessful trash runs at each location and argued that these might have been more fruitful particularly if used in conjunction with pole cameras;

(4) Grand Jury Investigations: Defendant noted that the officers merely stated that the "use of [the] grand jury and search warrants would be ineffective" because the search warrants would alert targets to their investigation and the grand jurors might not believe the testimony of a drug trafficker;

(5) Use of Global Positioning System (GPS): Finally, defendant maintained that the officers misinformed the issuing judge when they noted that a GPS was "highly successful" in determining the locations frequented by Chuy but that a wiretap was necessary to meet the "full potential" of the investigation, which was to identify and locate all of the members of the organization and dismantle the entire drug ring.

¶12 Our review of the record shows that the state effectively countered each of these allegations in its response. It noted, for example, that defendant's pole camera arguments failed to note that a pole camera was not used at Chuy's apartment complex because the officers had thought it more effective to conduct surveillance by renting the apartment across from his. However, even this tactic had proven insufficient in achieving the state's goal, which was to identify and locate all of the members of the drug organization. Similarly, as to the use of the potential informants defendant proposed, the state noted that these had been located based on information that had become available to police only after the authorization for intercepted telephone calls was granted.[3]

¶13 Defendant also took issue with the officers' avowals regarding the effectiveness of attempts to

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[3] Defendant also proposed another potential informant, L.V., and speculated that "[a]t a minimum, it was hard to believe" that, given her connection to Barraza-Mendoza, she would not have been able to assist the investigators in achieving the overall objectives of their investigation. However, the trial court specifically found that she had avowed through her attorney that she had no personal knowledge of defendant or of his organization and that police never linked any of the other proposed informants to defendant.

locate the residence of other co-conspirators through the analysis of subscriber telephone information. According to defendant, the officers had stated in their affidavit that, of the fourteen most frequently called numbers "nine (9) of the corresponding subscriber addresses are fictitious and do not exist, according to the Maricopa County Assessor [and,] [o]f the five addresses that do exist one is a church and the other is an apartment complex where the subscriber does not list an apartment number." Defendant maintained that the officers misled the issuing judge on this point by an omission of fact because they failed to acknowledge that one of the telephone numbers Barraza-Mendoza called seven times belonged to a subscriber at a Tuckey Lane address. The state acknowledged that this was due to a website entry error on the part of one of the officers, who was unaware of his mistake until defendant's motion brought it to his attention and he checked the address again with the Maricopa County Assessor's Office. An innocent or negligent mistake, such as this one appears to be, does not constitute a *Franks* violation. *State v. Carter*, 145 Ariz. 101, 109, 700 P.2d 488, 496 (1985).

¶14 After reviewing all of the evidence, the trial court concluded that defendant had failed to make a preliminary substantial showing that an evidentiary hearing was necessary. In so doing, the trial court specifically found that defendant had failed to provide any "[a]ffidavits or sworn or otherwise reliable statements of witnesses" or give any

explanation for their absence as required by *Franks*. 438 U.S. at 171. It further found that defendant had failed to show that the state had not complied with the necessity requirement in obtaining CWT-269 and that defendant's claims that it had misled the issuing court amounted to nothing more than a "second guess" about the techniques they should have adopted without any showing that these would have achieved the listed goals. Our review agrees with the trial court.

¶15 First, we note that the record on appeal contains no copy of the original affidavit supporting the CWT-269 application. It is the responsibility of counsel who raises objections on appeal to ensure that the record before us contains the materials to which they take exception. *State v. Zuck*, 134 Ariz. 509, 512-13, 658 P.2d 162, 165-66 (1982). We must therefore presume that the state's references to the affidavit in its response to defendant's motion are supported by the record. *See id.* at 513, 658 P.2d at 166.

¶16 Affidavits supporting a search warrant are presumed to be valid. *Franks*, 438 U.S. at 171. A challenger's attack therefore must be more than conclusory or speculative and must be supported by reliable statements. *Id.* As the trial court noted, defendant provided no such supporting materials in this case. There was no showing that the alleged omissions or falsehoods of which defendant complained misled the issuing court into making a

finding of probable cause and authorizing the wiretap. *Id.* Therefore, the trial court did not err in finding that defendant failed to make a substantial preliminary showing of the need for an evidentiary hearing on this basis alone.

Denial of Motion to Suppress

¶17 Nor did the trial court abuse its discretion in denying the motion to suppress. *State v. Ring*, 200 Ariz. 267, 273, ¶ 14, 25 P.3d 1139, 1145 (2001). Although wiretaps should not be routinely employed as the first step in criminal investigations nor issued in situations where normal investigative techniques are adequate to uncover the crime, a wiretap does not need to be used "only as a last resort." *Id.* at ¶ 15, 25 P.3d at 1145. While it is theoretically possible that other investigative techniques might have been successful, there is no requirement that all investigative strategies be exhausted before a wiretap application is properly granted. *Id.* at ¶ 16, 25 P.3d at 1145. Officers need not pursue every other possible device before resorting to electronic surveillance. *State v. Politte*, 136 Ariz. 117, 128, 664 P.2d 661, 672 (App. 1982).

¶18 "To meet the necessity requirement, the affidavit must state facts from which the issuing judge can determine that[,] in the particular investigation, traditional methods have been tried and failed or are unlikely to succeed." *State v. Hale*, 131 Ariz. 444, 447, 641 P.2d 1288, 1291

(1982)(emphasis added). Most importantly, the necessity requirement must be "interpreted in a commonsense fashion with an eye toward the practicalities of investigative work." *Id.*

¶19 Unlike some instances in which the necessity requirement was found not to have been met, this is not a case where the state did not attempt to use "traditional" investigative techniques before applying for a wiretap authorization. *See, e.g., Carneiro*, 861 F.2d at 1181 (affidavit misleading because DEA did not disclose its failure to conduct investigation before seeking wiretap). Here, as explained in the state's response to defendant's motions, conventional methods such as pole cameras, pen registers, and GPS tracking had been used but had failed to render the evidence needed to pursue the state's ultimate goal of developing evidence against all of the conspirators in order to dismantle the entire organization if possible. Necessity findings are consistently upheld where, as here, traditional techniques may lead only to the apprehension of the main conspirators but not their major suppliers, buyers or other major co-conspirators. *State v. Butz*, 982 F.2d 1378, 1383 (9th Cir. 1993).

¶20 Based on the evidence before us, we cannot find that the trial court abused its discretion in denying defendant's motion to suppress.

CONCLUSION

¶21 For the foregoing reasons, we affirm defendant's convictions and sentences.

/S/
JON W. THOMPSON, Judge

CONCURRING:

/S/
PHILIP HALL, Presiding Judge

/S/
DANIEL A. BARKER, Judge

Michael K. Jeanes, Clerk of the Court
*** Electronically Filed ***
07/17/2007 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2006-008681-011 DT 07/16/2007

HONORABLE THOMAS W. O'TOOLE

CLERK OF THE COURT
S. Perez
Deputy

STATE OF ARIZONA PAULA ALLEMAN

v.

AMANDO GAMBOA-MOLINA (011) HERMAN ALCANTAR, JR.

VICTIM WITNESS DIV-AG-CCC

RULING

The following issue has been under advisement following oral argument on June 29, 2007. No good cause appearing,

IT IS ORDERED denying the defendant's **Joint Motion to Suppress the Fruits of**

Electronic Surveillance and Search Warrants and Request for Hearing Pursuant to Franks v. Delaware claim that the police lacked necessity for obtaining a wiretap order.[4] The defendant failed to show that police did not comply with the necessity requirement in obtaining the wiretap in CWT-269. Necessity for a wiretap is established when the affidavit contains "a full and complete statement as to whether or not other investigative means have been tried and failed or why they reasonably appear unlikely to succeed if tried or to be too dangerous." A.R.S. section 13-3010(B)(3). The necessity requirement does not require that a wiretap be used "only as a last resort," *State v. Ring*, 200 Ariz. 267, 273 (2001), but to ensure that "wiretaps are not [used] routinely as the first step in criminal investigations." *U.S. v. Giordano*, 416 U.S. 505, 515 (1974). Here, a review of the detailed affidavit shows that traditional and normal investigative means were tried but failed to achieve the goals of the investigation and that other listed traditional means were unlikely to succeed. *Ring* at 273-274. In particular, the police made detailed avowals that they tried or considered the use traditional investigative means, including physical surveillance, pen registers, using informants and undercover operations, a grand jury investigation, search warrants, trash runs, pole cameras, and GPS

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[4] Previously, on 6/27/07, the court denied the Defendant's request for a *Franks v. Delaware* hearing.

tracking devices, explaining why they would not achieve the goals of this investigation. Although the issuing judicial officer read the affidavit and concluded that necessity had been established, the defendant now second guesses the police by claiming that they misled the court by failing to include in the affidavit their significant investigative successes, including the seizure of large amounts of contraband from other conspirators, and by failing to use pole cameras in different locations where they would have been more successful. However, the defendant fails to show that including this information or using the other investigative techniques would likely have achieved the listed goals of the investigation, including identifying all the co-conspirators of the large drug trafficking network and dismantling the organization. Additionally, police do not need to pursue every conceivable traditional investigative technique because "the necessity requirement is to be interpreted in a commonsense fashion with an eye toward the practicalities of investigative work." *Ring*, at 273, *citing State v. Hale*, 131 Ariz. 444, 447 (1982); *United States v. Martinez*, 588 F.2d 1227 (9th Cir. 1978). Here, pole cameras were only a small part of the entire surveillance tactic, which also consisted of physical surveillance and GPS tracking. In addition, use of the pole cameras at any location would never achieve the goal of identifying all of the co-conspirators so the necessity for a wiretap was obvious.

Finally, the defendant alleges that Lucy Vera and other persons were potential informants who should have been used before seeking a wiretap. However, the defendant fails to show that Ms. Vera or the other persons had any knowledge concerning this drug trafficking conspiracy or that their use would have been fruitful and not compromised the goals of the investigation. More significantly, Ms. Vera avowed through her attorney that she has no personal knowledge of the defendant or his organization, and police have never linked any of the other potential informants to the defendant. Requiring police to use informants not linked to the conspiracy would require "the indiscriminate pursuit to the bitter end of every non-electronic device . . . to a point where the investigation becomes redundant or impractical." *Hale* at 447; *United States v. Baker*, 589 F.2d 1008, 1013 (9th. Cir. 1979) (Interpreting the nearly identical Federal wiretap statute). Such is not required to establish the necessity for issuing a wiretap order.

In conclusion, the affidavit fully complied with the necessity requirement, and the wiretap order was proper.

Michael K. Jeanes, Clerk of the Court
*** Electronically Filed ***
06/28/2007 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2006-008681-011 DT 07/16/2007

HONORABLE THOMAS W. O'TOOLE

CLERK OF THE COURT
S. Perez
Deputy

STATE OF ARIZONA PAULA ALLEMAN

v.

AMANDO GAMBOA-MOLINA (011) HERMAN ALCANTAR, JR.

VICTIM WITNESS DIV-AG-CCC

MINUTE ENTRY

Good cause appearing,

IT IS ORDERED granting the **State's Motion to Vacate Evidentiary Hearing.** The June 29, 2007 Evidentiary Hearing is vacated. However, at 8:30 AM on that date, the court will

hear oral argument on the defendant's **Joint Motion to Suppress the Fruits of Electronic Surveillance and Search Warrants and Request for Hearing Pursuant to Franks v. Delaware**. The defendant, Gamboa-Molina, and the State will each have 20 minutes to argue their respective positions.

Franks v. Delaware Hearing

In his Joint Motion to Suppress, the defendant has clearly failed to make a substantial preliminary showing that the affiants knowingly, intentionally, or with reckless disregard for the truth made a false statement or omission that, if corrected, renders the remaining information insufficient to support a finding of probable cause. *Franks v. Delaware*, 438 U.S. 154 (1978). As the court explained in Franks, to require an evidentiary hearing "the challenger's attack must be more than conclusory..." and allegations of falsehoods "must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained." *Franks*, at 171. Here no such showing, affidavits or explanation for their absence, has been furnished or presented. *See also State v. Bolt*, 142 Ariz. 284 (App. 1983), where in affirming the trial court's refusal to grant a Franks hearing to allow the

defendant to explore an alleged falsehood in the affidavit, the court stated that a defendant is entitled to a *Franks* hearing only after making a "substantial preliminary showing" that the police intentionally misled the issuing magistrate or made reckless misstatements that were material to the finding of
probable cause in the affidavit. *Id.* at 287. As in *Bolt*, here the defendant has failed to make a substantial preliminary showing that the affidavits knowingly or intentionally misled the issuing judges or contained reckless statements or omissions, and failed to show that the falsehoods or omissions were necessary to the finding of probable cause and the issuance of the wiretaps. Therefore, he is not entitled to the requested *Franks* evidentiary hearing.

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FILED: 2007 MAY 30 PM 3:27

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Attorney for Defendant **Amando Gamboa-Molina**

SUPERIOR COURT
MARICOPA COUNTY, ARIZONA

STATE OF ARIZONA,	)	Case No. CR2006-008681-011DT
Plaintiff,	)	
vs.	)	**JOINT REPLY TO STATE'S RESPONSE RE SUPPRESSION OF OF WIRETAP EVIDENCE**
Amando Gamboa-Molina	)	
Defendant.	)	
	)	(Assigned to the Honorable Thomas O'Toole)

The remaining defendants in this action reply as follows. Basically, the State is claiming that

because agents Buscher and Bell submitted applications avowing the necessity of a wiretap and the defendants are merely making sweeping allegations to the contrary, the defendants' motion should be denied.

However, at a Franks hearing the defendants will present evidence the wiretap evidence should be suppressed for the reasons set forth in defendants' motion and reply herein.

I. INFORMANTS/COOPERATING WITNESSES/GENERAL QUESTIONING OR INTERROGATION UNDER AN IMMUNITY GRANT.

Defendants will present evidence Bell and Buscher misled the Court in their initial application for a wiretap. Judge Ishikawa was led to believe there was no informant or undercover officer who could be introduced to the targets of the investigation or their associates. Judge Ishikawa was informed there was no one who could "assist investigators in achieving the overall objectives of the investigation" and even if one was found, "such information would not likely assist in identifying the members of or any of the other drug trafficking organizations with which Adrian Barrraza-Mendoza,

aka Neja, and/or John Doe, aka Chuy are conducting business."[1]

This is not true. Since this case was filed, undersigned counsel has learned Lucy Becerra Vera began cooperating with law enforcement officials in January 2006---2 months before Bell and Buscher made their avowals, under oath, to Judge Ishikawa. Ms. Vera was a target in wiretap CINT-264. Ms. Vera is also a cooperating defendant in CR2006-008027-036DT.

Buscher was an applicant in wiretap CWT-264. According to Buscher and co-affiant Detective Ronald Gomez, "Lucy Vera is believed to be a major distributor of methamphetamine in the Metro-Phoenix area."[2] Ms. Vera is material in this case since Ms. Vera was a major drug distributor and dealt directly with Oscar aka Adrian Barraza-Mendoza: one of the principal targets of CWT-269.

Undersigned counsel is awaiting the State's response to defendant's request for the transcript of the January 2006 debriefing and Motion for Deposition of Ms. Vera. At the very minimum, it is hard to believe Ms. Vera, in light of her cooperation with law enforcement officials and her connection to Adrian Barraza-Mendoza would not have been able

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[1] *Id*, pgs, 65-66, ¶ 178.

[2] Exhibit One, Sixth amended affidavit in support of wire in CWT-264 pg 1, and pg. 7, ¶ 115.

to "assist investigators in achieving the overall objectives of the investigation."[3]

Ms. Vera's cooperation is significant. Her cooperation is significant because her omission in Buscher and Bell's application misled Judge Ishikawa on a material point: there was no one who could provide assistance identifying members of other drug trafficking organization who dealt with Barraza-Mendoza and Chuy.

As cautioned by the courts, The State must be SPECIFIC as to its reasons a wiretap is necessary in a particular investigation. The reason for this requirement is to prevent the State from making general allegations about classes of cases, thereby sidestepping the necessity requirement in the particular investigation for which the wiretap is sought. *United States v. Ippolito*, 774 F.2d 1482, 1486 (9th Cir. 1985). The Ninth Circuit in *Ippolito* when on to note: "The District of Columbia Circuit observed that:

> we must be careful not to permit the government to merely characterize a case as a "drug conspiracy"... that is therefore inherently difficult to investigate. The affidavit must show with specificity why in this particular

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[3] March 27, 2006 Application by Buscher and Bell, pg. 66, ¶ 178.

> investigation ordinary means of investigation will fail.

United States v. Robinson, 698 F.2d 488, 453 (D.C. Cir. 1983) (emphasis in original)." *Ippolito* at 1486.

The Ninth Circuit has been particularly vigilant in enforcing this requirement. The Ninth Circuit has consistently reminded the district courts of the stringent pre-conditions imposed by 18 U.S.C. § 2518(1)(c) and has not hesitated to order evidence suppressed when these stringent pre-conditions are not satisfied. *See, e.g., United States v. Blackmon*, 273 F.3d 104, (91h Cir. 2001); *United States v Kalustian*, 529 F.2d 585, 588-90 (9 th Cir. 1975). *See also, United States v. Ailemen*, 986 F.Supp. 1228 (N.D. Cal. 1997); *United States v. Curreri*, 388 F. Supp. 607, 619 (D.Md. 1974). In fact, the Ninth Circuit remarked in *United States v. Baker*, 589 F.2d 1008, 1011 (9th Cir. 1979), that reliance on "conclusionary language, circumstances that would apply to problems that could be expected in the investigation of ordinary. . . . cases, the stretching of a single investigative episode into 'a full and complete statement', or undue reliance upon the investiga:or's experience in other cases" does not comply with the statutory requirement set forth in 18 U.S.C. § 2518 (1)(c). *Baker*, 589 F.2d at 1011.

In *Kalustian, supra*, the Ninth Circuit held that mere conclusory assertions that traditional procedures had failed in the past or were likely to

fail in the future did not comply with the statutory requirement. The *Kalustian* panel stated:

> Obviously, electronic surveillance can facilitate criminal investigation... But Title III does not allow wiretapping to replace such other techniques unless they "have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

Kalustian, 529 F.2d at 590.

An examination of the legislative history of Title III upon which Arizona's electronic surveillance law is premised makes it is clear Ms. Vera's role in this case would fall within the "normal investigative procedures" contemplated under both federal and Arizona law.

Examples of what the United States Congress meant by the phrase "other investigative procedure" are:

> Normal investigative procedures would include, for example, standard visual or aural surveillance techniques by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search warrants and the infiltration of

> conspiratorial groups by undercover agents or informants...

Senate Committee on the Judiciary, Report on the Omnibus Crime Control and Safe Streets Act of 1967, 90 th Cong., 2nd Session (S. Rep. 1097 April 29, 1968) notes at page 101.

Clearly, Ms. Vera's role, at least according to agents Buscher and Gomez in CWT-264, as a major drug trafficker who was cooperating with law enforcement officers caused Judge Ishikawa to find "necessity" lacking in this case. *United States v. Blackmon*, 273 F.3d 1204, 1207 (9th Cir. 2001) ("necessity" requirement for wiretap authorization).

Buscher and Bell's failure to tell Judge Ishikawa of Ms. Vera's cooperating is a material omission. As such a Franks hearing is required. *United States v. Ippolito*, 774 F.2d 1482, 1485 (9th Cir. 1985) (necessity requirement subject to Franks hearing, citing *United States v. Brooklier*, 685 F,2d 1208, 1221 (9th Cir. 1982).

At the pleadings stage, defendants need only make a "preliminary showing that the wiretap applications contained material misrepresentation or omissions" to trigger a Franks hearing. *United States v. Gonzalez, Inc. dba Golden State Transportation*, 04-10041 (9th Cir. 2005).

II. MATERIAL OMISSIONS REGARDING OTHER NORMAL INVESTIGATIVE PROCEDURES.

At a Franks hearing, defendants will call Gregory Salazar as an expert witness on the necessity requirement and normal investigative procedure relevant to the wiretap in this case. Mr. Salazar recently retired as Senior Special Agent with the U.S. Drug Enforcement Administration (DEA/DOJ). In his 15 years with DEA, Mr. Salazar worked on several T-III non-consensual wiretaps for DEA, Metro Gang Task Force (MGTF) and FBI wiretaps. Mr. Salazar, along with documentation and evidence from the prior wiretap, CWT-264, will support the defendants' claim the State, at the very minimum, misled Judge Ishikawa by: 1. Misrepresenting the limited use of pole cameras at both the Calle de La Luna residence and McDowell Road apartments; 2. misrepresented the addresses found or not found via public records which were subject to normal investigative procedures; and 3. failed to advise Judge Ishikawa. Ms. Vera was "a major distributor of methamphetamine in the Metro-Phoenix area" and cooperating with law enforcement authorities with ties to the targets of the investigation in CWT-269.

This Court should grant defendants' motion for a Franks hearing. After taking evidence, this Court should then grant defendants' motion to

suppress evidence obtained a result of the wiretaps in this case.

Dated this 25th day of May, 2007.

/s/
Herman Alcanta , Jr., Esq.

Copies of the foregoing
delivered this 25th day
of May, 2007, to:

Honorable Thomas O'Toole
Superior Court Judge
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Attorney for Ernesto Kinori Villa (030)

By /s/

EXHIBIT ONE

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA	)	
	)	CWT-264
Michael Alvarez	)	
Flore aka Greedy al	)	
	)	

INVESTIGATING OFFICERS' FIRST EXTENDED AND SIXTH AMENDED AFFIDAVIT IN SUPPORT OF AN ORDER AUTHORIZING INTERCEMON OF THREE NEW FACILITIES TERMINATING TWO FACILITIES AND EXTENDING INTERCEPTION OF TELEPHONIC COMMUNICATIONS (WIRE, ORAL AND ELECTRONIC), TRAP AND TRACE AND CALLER IDENTIFICATION

AFFIDAVIT

Phoenix Police Department Detective Ronald Gomez #5018 and Detective Jason Buscher #6545, being duly sworn, depose and say: This affidavit is submitted in support of an extended order seeking authorization for the extended interception of telephonic communications (wire, electronic, and oral) over the previously identified facilities of: Carlos Ernesto Franco-Alapisco, Lucy Vera, Veronica Leyva, Leonel, Oscar, Tricia Golden, and other co-conspirators both known and yet unknown, over additional cellular telephones identified herein as (602)435-8931 (Target Line #13 — New Request), 316010105541260 (IMSI) (Target Line # L4 New Request), and (480)643-9108 (Target Line #15 — New Request) within Maricopa County, Arizona. Further, this affidavit is submitted in support of an order seeking authorization for the

14. Veronica Leyva is the girlfriend of Carlos Ernesto Franco-Alapisco and believed to be a major distributor of Methamphetamine along with Carlos Ernesto Franco-Alapisco. A records check was conducted on Veronica Leyva with a date of birth 8/28/85. She was found to have a Phoenix Police Scan Number 0205140176. This record indicated that on November 3, 2002, Veronica Leyva was fingerprinted by the Phoenix Police Department. No arrest record was located for Veronica Leyva.

LUCY VERA:

DATE OF BIRTH:	**REDACTED**
SSN:	**REDACTED**
HOME ADDRESS:	1802 North 84th Lane, Phoenix
EMPLOYED:	None Known
PLACE OF BIRTH:	Arizona
DRIVER LICENSE:	**REDACTED**
FBI #:	**REDACTED**
SID#:	**REDACTED**

15. Lucy Vera is believed to be a major distributor of methamphetiamine in the Metro-Phoenix area. A records check was conducted on Lucy Vera with a date of birth of **REDACTED**. She was found to have a Phoenix Police Scan Number 9306060337.

16. This records check indicated that on July 8, 1995, Lucy Vera was arrested for Theft of a Credit Card, Phoenix Police Report #51135680. The case was prosecuted by the Maricopa County Attorney's Office and assigned CR1995-008283A. On June 19, 1998, Lucy Vera was placed on probation and completed a term of probation with the Maricopa County Adult Probation Office. On June 21, 2000, Lucy Vera received an Order of Discharge of Probation, and the offense was designated a misdemeanor.

17. On August 10, 1995, Lucy Vera was arrested for Forgery. On September 24, 1998, the case was turned down by the Maricopa County Attorney's Office for prosecution.

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Attorney for Defendant **Amando Gamboa-Molina**

SUPERIOR COURT
MARICOPA COUNTY, ARIZONA

STATE OF ARIZONA,	)	Case No.
	)	CR2006-008681-011DT
Plaintiff,	)	
	)	**SUPPLEMENTAL**
vs.	)	**JOINT MOTION TO**
	)	**SUPPRESS THE**
Amando Gamboa-	)	**FRUITS OF**
Molina	)	**ELECTRONIC**
	)	**SURVEILLANCE**
Defendant.	)	**AND SEARCH**
	)	**WARRANTS AND**
	)	**REQUEST FOR**
	)	**HEARING**
	)	**PURSUANT**
	)	**TO *FRANKS V.***
	)	***DELAWARE***

Defendants Amando Gamboa-Molina (011) and Mario Velasco-Felix (027) supplement their joint motion to suppress e-filed on March 29, 2007. Defendants Gamboa-Molina and Veleasco-Felix supplement their motion as follows.

1. SUPPLEMENTAL FACTS.

This case stems from a 2005 investigation regarding Adrian Barraza-Mendoza and several other individuals. Investigators received information that Barraza-Mendoza was a multi-pound methamphetamine and multikilogram cocaine drug trafficker. According to police, Barraza-Mendoza was responsible for trafficking cocaine and methamphetamine in the Phoenix metropolitan area. (DR 2006-60901537 at p. 5. ¶ 1.)

Investigators began conducting surveillance between October 2005 and December 2005. During this time police were authorized to use a wiretap (hereinafter CWT-264) to conduct their investigation. Based on the information collected from this wiretap, investigators were able to begin a second narcotics investigation on Barraza-Mendoza. Police were authorized to use a second wiretap (hereinafter CWT-269) to conduct surveillance on Barraza-Mendoza and his associates.

On May 12, 2006, using information obtained from the second-wiretap, law enforcement officials arrested Barraza-Mendoza (DR 2006-60901537 at p.

4. ¶ 1.). Subsequent to this arrest, investigators received information that Defendant, Amando Gamboa-Molina, was also involved in narcotics trafficking.

Investigators were authorized to continue their use of wiretap surveillance (CWT-269) to proceed with their investigation regarding Gamboa-Molina. On June 2, 2006, after one month of surveillance, investigators arrested Gamboa-Molina and charged him with narcotics trafficking.

Defendant Gamboa-Molina now challenges the validity of the original wiretap, CWT-264, and the second wiretap, CWT-269. Defendant contends that the second wiretap contains only conclusory statements and boilerplate language obtain from the original wiretap application in CWT-269. More important, the Court should suppress evidence obtained from the wiretap because not only did the State fail to utilize traditional prewiretap investigative techniques, but misled the Court in obtaining the original wiretap, CWT-269, in this case.

The State misled the issuing Court via intentional or reckless omission or inclusion of material facts.

2. MATERIAL OMISSION OR INCLUSION OF MISLEADING FACTS IN AFFIDAVITS PRESENTED BY AGENTS BUSCHER AND BELL.

A. Physical Surveillance.

(1). *Pole Cameras.*

One of the most common investigative methods is the use of physical surveillance. Before seeking a wiretap, the State must set forth with specificity that surveillance had been attempted and failed, or why in this investigation it was likely to fail. *United States v. Carneiro*, 861 F.2d 1171 (9th Cir. 1988).

Buscher and Bell avowed to the Court the use of a pole camera as to Barraza-Mendoza was limited because of the view. As to the other main target, "Chuy", a pole camera could view who went in and out of Chuy's apartment, but could not see from which vehicle people arrived or left the apartment.

Buscher and Bell's avowals as to both locations are untrue and misleading. Attached Exhibit A contains photographs of the Barraza-Mendoza residence on Calle De La Luna. Exhibit A clearly shows a light pole almost directly in front of the residence. This light pole is exactly the type of pole used by police in this case, except the one used by the police was several yards west from the pole

depicted in Exhibit A hence the limited view and limited use of this traditional method,

Exhibit B shows the front of Chuy's apartment. The photographs in Exhibit B not only show the front door to Chuy's apartment, but the trash dumpster and multiple parking spots in front of the apartment. A pole camera at this location would not only show persons driving up and entering Chuy's apartment, but persons leaving the apartment and placing trash in the dumpster for purposes of "trash runs."

(2). ***Addresses***.

Agents Buscher and Bell stated in their affidavits that they had analyzed the telephone records of Barraza-Mendoza and Chuy in order to identify other members of the organization. Using subscriber telephone information the agents attempted to locate the residences of other possible co-conspirators. Using this information, agents Buscher and Bell noted that of the 14 most frequently called numbers, "nine (9) of the corresponding subscriber addresses are fictitious and do not exist according to the Maricopa County Assessor. Of the five addresses that do exist, one is a church and the other is an apartment complex where the subscriber does not list an apartment number."[1]

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[1] First Application for Wiretap, Pg. 40, ¶112, lines 11-14.

On this point, the Court was misled by omission of material facts. For example, between March 18, 2006 and March 20, 2006 Barraza-Mendoza called (602) 246-1689 seven times. The subscriber to this number was Nieves Rodriguez at 2738 W. Tuckey Lane in Phoenix. Although agents advised the Court Mr. Rodriguez was found to have a DEA record and had been investigated in 1994 for methamphetamine, the agents went on to state: "No other information is known about the case."[2]

What agents Bell and Buscher failed to tell the Court was that the West Tuckey address was a LEGITMATE ADDRESS; an address which had a landline telephone and the home of a possible drug dealer. Attached Exhibit C is a photo of the home located at 2738 West Tuckey Lane. This is material since this home is subject to traditional methods such as surveillance, trash runs, mail covers, etc.

During December 2, 2005 and January 1, 2006, Mr. Barraza-Mendoza had contact with (602) 435-940 approximately 62 times. The telephone number corresponded to Yvonne Lewis at 914 North 9th Street in Phoenix. Although agents advised the Court this was a legitimate address, the agents found no identifying records for Yvonne Lewis.[3] 3 Attached Exhibit D shows photos of the home located

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[2] Id, Pgs 51-52, ¶ 147, lines 19-22, 1-2.

[3] Id. Pgs. 42-43, ¶ 119, lines 21-23, 1-3.

at 914 North 9th Street. As the photos indicate, there is a trash can in front of the home; and vehicle parked in the driveway. The agents failed to mention the home located at 914 was conducive to traditional methods such as surveillance, tracing license plate numbers and trash run.

Mr. Barraza-Mendoza also had about seventy-six (76) contacts with (602) 487-0515. These contacts occurred between February 3, 2006 and March 20 2006. The subscriber to (602) 487-0515 was Patricia Castro at 4121 West Encanto Boulevard in Phoenix. Busher and Bell claim 4121 West Encanto is "not a legitimate address:"[4] Attached Exhibit E is a photo of the home located at 4121 West Encanto Boulevard in Phoenix. This is a legitimate address.

As to Chuy: Between January 21, 2006 and March 20, 2006, Chuy had telephone contact seventy-two (72) times with another known drug dealer: Guadalupe Porras. Mr. Porras subscribed to (602) 510-8765. This number had a subscriber address of 4619 North 50 th Drive. Mr. Porras had a DEA record and had been arrested on June 25, 2003 for possession to sell marijuana, methamphetamine, cocaine and two loaded handguns.[5] Agents omitted mentioning in their affidavit that 4619 North 50th Drive was a legitimate address. Attached Exhibit F

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[4] Id. Pg. 49 ¶ 39,1ines 14-19.

[5] Id, Pg. 53,¶ 152, lines 7-16.

displays photos of the residence on 50th Drive. Again, as the photos indicate, traditional methods could have been used on the home located on 50th Drive.

(3) Summary regarding surveillance and addresses.

The facts in *Carneiro, supra*, are important to review in order to determine whether the State misled the Court regarding its need for a wiretap in this case. In *Carneiro*, the Ninth Circuit Court of Appeals found 3 of the 4 wiretaps in that case did not meet the necessity requirement. The Court in *Carneiro* noted the government's wiretap application claimed that physical surveillance of the defendant was "extremely difficult" because his residence was partially fenced and was located on an unimproved street away from major traffic. Although this was true, the government omitted that it had not attempted surveillance at all. The Court held that the government's failure to attempt surveillance, and the possibility that the application could have misled the issuing judge into believing that the agents' surveillance efforts had failed, violated the necessity requirement. *Carneiro* at 1180, 81 discussing *Harily Wiretap*.

In this case, the agents' use of physical surveillance was only slightly better than that in *Carneiro*. The State did employ some surveillance. However, the State is misleading as to why for

instance the use of the pole camera on the two primary targets would be of little or no value. Exhibit A of the Calle De La Luna residence indicates no viewing impediments and Exhibit B of the McDowell apartments clearly shows the agents misled the Court regarding the viewing of persons arriving at the McDowell apartments and then entering Chuy's apartment.

In addition, on May 12, 2006, investigators executed a search warrant at 7111 N. 75th Avenue. Prior to the warrants, information gathered through a number of sources including "intensive surveillance" revealed that Barraza-Mendoza had been using this apartment as a stash house. (DR 2006-60901537 at p. 7. in 2.) Detectives recovered a host of evidence from this search warrant. This evidence included: ledgers, drug paraphernalia and identification of people involved in the Barraza-Mendoza drug operation. (DR 2006-60901537 at p. 9. ¶ 1-7.)

However, this information gathered from the residence on 75th Drive was omitted from the wiretap application for Defendant, Gamboa-Molina. [CWT-269.] Instead, the application falsely claimed that surveillance had not provided insight into the Barraza-Mendoza organization.

This case is analogous to *Carneiro*. Here, agents Buscher and Bell's allegations in the application "could have misled the issuing judge"

into concluding that law enforcement's surveillance had been considerably more extensive and far less successful. *Carneiro* at 1180 citing *Ippolito*, 774 F.2d at 1487, and *United States v. Simpson*, 813 F.2d at 1472.

B. Confidential Informants.

A second traditional investigative technique is the use of confidential informants. Before obtaining a wiretap, law enforcement must pursue the use of informants and state with specificity how informants had failed or why in this investigation they were likely to fail. *United States v. Ippolito*, 774 F.2d 1482 (9th Cir. 1985).

In *Ippolito*, the government's wiretap application stated that a wiretap was necessary because its informants were unwilling to testify against the defendant. However, one informant was willing to testify, but that fact was concealed from the issuing judge. Based on this misrepresentation, the Court upheld the lower court's suppression of the wiretap intercepted conversations.

Here, prior to seeking the wiretap, Buscher and Bell knew of informants with considerable information about Barraza-Mendoza and his associates' narcotics-related activities. The State's wiretap application, however, omitted any mention of the informants and the information they had provided. [CWT-269.] Instead, the wiretap

application claimed there were no confidential informants "in a position to assist" in the government's investigation. [CWT-269.]

Buscher and Bell defend this statement by claiming that the informants were uncooperative. This is incorrect. The informants were cooperative, the agent simply made no effort to use them. For instance, on April 20, 2006 investigators served a search warrant at the address 801 East Weir Avenue in reference to a narcotics investigation. (DR 2006-607466020 at p. 2 ¶ 1.) Once entry was complete, investigators found a woman named "Elisa." They asked Elisa if she knew why the police were at her home. She responded, "no." Investigators asked her if she or her husband or anyone else she knew were involved with drug trafficking. Elisa said that her friend, Adrian Barraza-Mendoza, had been arrested a few days ago for drugs, and that Barraza-Mendoza and his wife had been to her home several times. (DR 2006-607466020 at p. 3 ¶ 2.)

In addition, on May 8, 2006, investigators arrested Maria Guadalupe Coronel-Villapuda and Margarito Echeveria-Ibarra for money laundering. Subsequent investigation conducted by authorities revealed that Barraza-Mendoza had given them $127,000 to transport to Mexico. Despite having this information, authorities released these two suspects after taking their photographs and fingerprints for future identification. (DR 2006-60874662 at p. 4 ¶ 1.)

Coronel-Villapuda and Echeveria-Ibarra were never asked by police to participate as informants in their narcotics investigation. For several days, authorities conducted surveillance at their home, knew the type of vehicle used to transport the money, and documents referencing the identity of these individuals. *United States v. Killingsworth*, 117 F.3d 1159 (10th Cir. 1997) ("the government must consider reviewing available public, private or governmental records")

As in *Ippolito*, Buscher and Bell's failure to truthfully disclose the availability of its informants is fatal. Had Buscher and Bell provided accurate infor ation regarding Coronel-Villapuda and Echeveria-Ibarra, i.e., that they were not even asked to be informants, the issuing Court in this case would not have authorized a wiretap.

C. Pen Registers and Other Phone Records.

A third investigatory technique is the use of pen register, trap and trace devices, and telephone toll and subscriber records. It is commonly known that these phone records will not disclose the contents of calls and, therefore, are less informative than wiretaps. *United States v. Brown*, 761 F.2d 1276 (9th Cir. 1985). Despite this limitation, pen registers and related devices are valuable investigative tools and before obtaining a wiretap, the government must state "with specificity why in

this particular investigation" this approach failed or is likely to fail.

In this case, Buscher and Bell summarily dismissed telephone toll and subscriber records, pen registers and trap and trace devices. [CWT-269] The application noted the inherent limitations of these methods, but provided no indication why in this particular investigation these methods would fail. Further, Buscher and Bell omitted that these phone devices had established links between Barraza-Mendoza and Gamboa-Molina. *See United States v. Robinson*, 698 F.2d 488, 453 (D.C. Cir. 1983) (The Affidavit must show with specificity why in this particular investigation ordinary means of investigation will fail) (emphasis in the original).

In Bushcer's CWT-269 affidavit, however, he noted that the records for Barraza-Mendoza's cell phone showed calls to his associates. Moreover, they provided a detailed graph that identified individuals that Barraza-Mendoza called. [CWT-269.] Nevertheless, they failed to provide a detailed account of this finding. More important, the use of pen registers was never used in Gamboa-Molina's case; despite minimal use in Barraza- Mendoza's case. Therefore, the facts of this particular case undermine the State's claim of necessity.

In sum, Buscher and Bell's pre-wiretap investigative efforts, albeit limited in time and scope, were remarkably productive. None had failed, nor

was there any indication that any were likely to fail. Instead, the wiretap application for CWT-269 concealed the nature and extent of the pre-wiretap investigation. On this basis, the court should grant the defendants' motion to suppress the fruits of electronic surveillance and search warrants and request for a hearing pursuant to Franks v. Delaware.

D. Normal Amount of Resources

To satisfy the necessity requirement, the government must also submit a "full and complete" statement establishing that in this particular investigation, normal investigative techniques employing a normal amount of resources have failed to make the case within a reasonable period of time. *United States v. Spagnuolo*, 549 F.2d 705, 710 (eCir. 1977),

Before deeming a normal investigative technique a failure, it must have "reached a stage where further use cannot reasonably be required." *Id.*, at 710 n. 1, *citing United States v. Sandoval*, 550 F.2d 427 (9th Cir. 1976) and United States v. Scully, 546 F.2d 255 (9th Cir. 1976); *Ippolito*, 774 F.2d at 1486 ("It is not unreasonable to expect the government to utilize those methods that appear to be potentially productive").

The State's investigative effort clearly fails this test. The Gamboa-Molina investigation lasted

about a month. The physical surveillance, which led to the arrest of Barraza-Mendoza, was successful. In Gamboa-Molina's case, unlike Barraza-Mendoza's case, authorities made no attempt to engage in physical surveillance. Furthermore, there were knowledgeable informants that surfaced but no effort was made to use them in this particular case; and pen registers and related devices were not used.

Despite these undeniable facts, the State claims that "the agents thoroughly explored other investigative techniques." [CWT-269.] Although the agents may have a unique definition of "thoroughly explor[ing] other investigative techniques," it is abundantly clear that none of these methods had "reached a stage where further use cannot reasonably be required."

As noted earlier, the State did have success in its pre-wiretap investigative techniques regarding Barraza-Mendoza. Unfortunately, the State failed to use them in this particular case. Thus, in Gamboa-Molina's case, the State's wiretap application violated the necessity requirement, and the evidence obtained from wiretap CWT-269 should be suppressed.

A court considering a motion of this kind must conduct a Franks hearing if the defense makes an initial showing that the State's affidavits contained an intentional or reckless inclusion or omission, and that the inclusion or omission was material. *United*

States v. Bennett, 219 F.3d 1117, 1124 (9th Cir. 2000). Based on that hearing, this Court will be asked to find that the intercepts were unlawfully obtained in this case, and therefore should be suppressed, as should any and all fruits thereof. *Wong Sun v. United States*, 371 U.S. 471 (1963).

Dated this 13th day of April, 2007.

/s/
Herman Alcanta , Jr., Esq.

Copies of the foregoing
delivered/faxed this 13th
of April, 2007, to:

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By /s/

EXHIBIT "A"

(Calle De la Luna residence)

PETITIONER'S NOTE:
Photographs excluded
From Supreme Court Petition

EXHIBIT "B"

(6901 W. McDowell – Chuy's Apartment)

PETITIONER'S NOTE:
Photographs excluded
From Supreme Court Petition

EXHIBIT "C"

(2738 West Tuckey Lane)

PETITIONER'S NOTE:
Photographs excluded
From Supreme Court Petition

EXHIBIT "D"

(914 North 9th Street)

PETITIONER'S NOTE:
Photographs excluded
From Supreme Court Petition

EXHIBIT "E"

(4121 W. Encanto Boulevard)

PETITIONER'S NOTE:
Photographs excluded
From Supreme Court Petition

EXHIBIT "F"

(4619 North 50th Drive)

PETITIONER'S NOTE:
Photographs excluded
From Supreme Court Petition

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Attorney for Defendant **Amando Gamboa-Molina**

SUPERIOR COURT
MARICOPA COUNTY, ARIZONA

STATE OF ARIZONA,	)	Case No. CR2006-008681011) & (027)DT
Plaintiff,	)	
	)	**JOINT MOTION**
vs.	)	**TO SUPPRESS**
	)	**THE FRUITS OF**
Amando Gamboa-Molina	)	**ELECTRONIC SURVEILLANCE**
	)	**AND SEARCH**
Defendant.	)	**WARRANTS AND**
	)	**REQUEST FOR**
	)	**HEARING**
	)	**PURSUANT**
	)	**TO *FRANKS V. DELAWARE***

)
) (Assigned to the
) Honorable Thomas
) O'Toole)

Defendants Amando Gamboa-Molina (011) and Mario Velasco-Felix (027) move to suppress intercepted communications and all fruits thereof.

Defendants contend these communication and fruits thereof were obtained in violation of ARS §13-3010, Fourth Amendment to the US Constitution and Article 2, § 8 of the Arizona Constitution.

Because defendants contend the State presented inaccurate or misleading information in its application(s) in seeking the wiretaps obtained in this case, the defendants request this Court conduct a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978).

MEMORANDUM

I. FACTUAL BACKGROUND.[1]

This case, CWT-269, involves numerous defendants and narcotics violations stemming from a previous wiretap: CWT-264 in Maricopa County.

[1] The factual background is based upon documents disclosed by the State to defendants via Rule 15, AzRCP disclosure requirement

CWT-264 also involved numerous defendants and narcotic offenses. CWT-264 began on October 27, 2005 and ended on or about December 15, 2005. During the October-December, 2005 time period, an Adrian Barraza-Mendoza and a person known then only as "Chuy" were electronically intercepted and suspected of trafficking in multi-quantities of cocaine and occasionally methamphetamine. "Chuy" was later identified as Jose Antonio Velarde.

Thereafter in about mid-December 2005, law enforcement officials began a narcotics investigation into what police believed was another large-scaled narcotics organization led by Adrian Barraza-Mendoza. The Barraza-Mendoza investigation was led by Detective Jason Buscher of the Phoenix Police Department and Special Agent Steven Bell of the U.S. Drug Enforcement Administration (DEA). Both Buscher and Bell participated in the prior wiretap investigation: CWT-264 and are co-affiants of the applications for the wiretap which is the subject of this motion: CWT-269.

According to Buscher and Bell, law enforcement officials tried for about four months to identify and arrest those persons involved in the Barraza-Mendoza organization. However, Buscher and Bell, avowed under oath, that during December 2005 to March 2006 time period, traditional investigative procedures had either been tried and failed or were unlikely to succeed if tried and therefore applied for a wiretap intercept order.

On March 27, 2006, this application and order was presented by Buscher and Bell to the Hon. Brain K. Ishikawa, Judge of the Maricopa County Superior Court. Judge Ishikawa signed and entered the ex parte wiretap intercept order that same day, March 27, 2006.

Over the following weeks, Buscher and Bell applied and received approval for nine (9) additional intercept orders involving the Barraza-Mendoza investigation. The last order was issued on May 24, 2006 by the Hon. James H. Keppel.

Using information obtained via the ten intercept orders, law enforcement officials obtained and executed numerous search warrants as well as arrests of those believed to be involved in illegal drug trafficking. Among those arrested were defendants Amando Gamboa-Molina and Mario Velasco-Felix. Both were arrested on June 2, 2006 and are the subject of this motion to suppress.

II. STANDING.

Telephone calls made by or received by both defendants herein were intercepted by police as a result of the ex parte wiretap orders obtained by Buscher and Bell. Persons whose calls are intercepted via wiretap orders have standing to challenge the wiretap applications and orders. *See State v. Olea*, 139 Ariz. 280 (1983).

III. LAW AND ARUGMENT:

THE FRUITS OF THE WIRETAPS MUST BE SUPPRESSED BECAUSE THE STATE DECEIVED THE COURT IN REGARD TO HOW EFFECTIVE "NORMAL NVESTIGATIVE PROCEDURES" COULD BE IN THIS CASE, AND BEG/0SE IT FAILED TO SUFFICIENTLY PURSUE THE USE OF THOSE MEANS BEFORE APPLYING FOR WIRETAP AUTHORIZATION

There is a statutory presumption against granting a wiretap application. *United States v. Ippolito*, 774 F.2d 1482 (9th Cir. 1985). Arizona's el9ctronic intercept statute mirrors the federal statute: Title Ill of the Omnibu5 Control and Safe Streets Act of 1968. Title Ill provides that prior to granting an ex parte intercept order, law enforcement officials must present "A full and complete statement as to whether or not other investigative procedure have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." ARS §13-3010 (B)(3).

This provision is designed to insure electronic surveillance is not used as the initial step in a criminal investigation. *State v. Hale*, 131 Ariz. 444, 447 (1982); *United States v. Giordano*, 416 U.S. 505, 515 (1974).

This provision is commonly known as the "necessity requirement." *United States v. Blackmon*, 273 F.3d 1204, 1207 (9th Cir. 2001). The "necessity requirement" exists to limit and control the use of wiretaps because of their highly intrusive and volatile nature and to ensure that wiretapping is not used in situations where "traditional investigative techniques would suffice to expose the crime." *United States v. Kahn*, 415 U.S. 132, 153, n. 12 (1974); *United States v. Brown*, 761 F.2d 1271, 1275 (9th Cir. 1985).

If the application does not contain an adequate "statement" concerning the use of other investigative procedures, an order based upon such application is invalid and any electronic communications which are subsequently intercepted must be suppressed from evidence as well as all fruits of that illegally obtained evidence. *See e.g., United States v. LiIla*, 699 F.2d 99, 104 (2d Cir. 1983); *United States v. Spanuolo*, 600 F.2d 1317, 1321-22 (9th Cir. 1979)(each subsequent application must meet the necessity requirement); *United States v. Carniero*, 861 F.2d 1171, 1176-77 (9th Cir. 1988)(each subsequent application must independently satisfy the "necessity" requirement).

The Arizona statute requires a "full and complete statement" regarding use of other traditional or less intrusive investigative procedure before a wiretap order is granted. ARS §13-3010 (B)(3).

This statement must be factual and not mere conclusions. In *United States v. Kalustian*, 529 F. 2d 585, 588-90 (9 th Cir. 1975), the Ninth Circuit Court of Appeals held that merely conclusory statements that traditional procedures have failed in the past or are likely to fail in the future did not comply with the statutory requirement.

The statement in support of the application must be a statement as to why a particular investigation requires a wiretap to complete its goals. Mere "boilerplate recitation of the difficulties of gathering usable evidence is not a sufficient basis for granting a wiretap order." *United States v. Kerrigan*, 514 F.2d 35, 38 (9th Cir. 975). Also, general allegations which would be true in most narcotic investigations do not meet the criteria of the necessity requirement. *E.g., United States v. Castillo-Garcia*, 920 F.Supp. 1537, 1543 (D. Colo. 1996).

Moreover, the courts not only frown upon generalities or conclusions in applying for an intercept order but the applicant must articulate specific reasons as to why normal investigative methods were unsuccessful or likely to fail. On this point, the District of Columbia Circuit Court observed:

> We must be careful not to permit the government to merely characterize a case as a drug conspiracy... that is

> therefore inherently difficult to investigate. The Affidavit must show with specificity why in this particular investigation ordinary means of investigation will fail.

United States v. Robinson, 698 F.2d 488, 453 (D.C. Cir. 1983) (emphasis in original).

In this case, defendants Gamboa-Molina and Mario Velasco-Felix contend normal investigative procedures would have accomplished the goals sought by the State. Also the statements presented to the Court by Buscher and Bell were inaccurate and misleading. For that reason, this Court should conduct a hearing in regard to these matters pursuant to *Franks. v. Delaware*, 438 U.S. 154 (1978).

A court considering a motion of this kind must conduct a Franks hearing if the defense makes an initial showing that the State's affidavits contained an intentional or reckless inclusion or omission, and that the inclusion or omission was material. *United States v. Bennett*, 219 F.3d 1117, 1124 (9th Cir. 2000). Based on that hearing, this Court will be asked to find that the intercepts were unlawfully obtained in this case, and therefore should be suppressed, as should any and all fruits thereof. *Wong Sun v. United States*, 371 U.S. 471 (1963).

Defendants will be presenting additional documentation in a supplemental pleading to this motion to support their request for a Franks hearing.

IV. THE STATE FAILED TO DEMONSTRATE THE NECESSITY WIRETAPS IN THIS CASE.

A. PHYSICAL SURVEILLANCE.

1. Pole Cameras (live video).

(a). State's claim.

In this case, there were two target locations: Barraza-Mendoza's residence Idcated at 11226 W. Calle De La Luna in the city of Glendale and "Chuy's" apartment located at 6901 W. McDowell Road, apt.# 8905.

On March 1, 2006 a pole camera was installed with a view of the west side of the Barraza-Mendoza residence. However, the State claims this was limited because of the "view". According to Buscher and Bell, the pole camera did not provide a view of those persons who entered and left the Barraza-Mendoza residence because the front door was not visible.

Also Buscher and Bell claim a pole camera would not assist investigators in regards to Chuy's

residence because he lived in an apartment complex. Buscher and Bell claim a pole camera would assist in viewing persons entering and leaving the apartment. However, the pole camera would not show which vehicle persons arrived in or left.

(b.) Actual facts.

A pole camera, when placed almost directly in front of the Calle de la Luna residence, would give a clear view of the front door to the residence. This view would assist in identifying those persons who entered and exited the residence. This pole camera would not only assist investigators in the identification of persons, but unusual activities associated with drug trafficking, patterns and habit of inhabitants, vehicles identification as was well as a fairly clear view into the garage with an open door.

A pole camera at the McDowell apartments would enable investigators to not only view the target apartment, but THE COVERED PARKING IN FRONT OF THE RESIDENCE. A pole camera at the McDowell residence would not only assist with surveillance of the McDowell apartment, but the community trash dumpster, located about 50 yards in front of the residence. That is, assist in traditional police methods called "trash runs".

B. INFORMANTS AND UNCOVER OPERATIONS.

(1.) State's claim.

Buscher and Bell both claimed they knew of no informants or undercover officers who could be introduced to the targets of this investigation. Buscher and Bell claim that even if such informant or undercover officers did exist, it would be of no avail.

(2.) Actual facts.

Buscher and Bell only presented conclusions and unsupported opinions regarding the non-use of informants and undercover officers. There is no evidence Buscher or Bell even asked any informants or undercover officers if they were willing to pose as buyers or seller of drugs in order to penetrate this target organization. A hearing will establish police merely used "boilerplate" language regarding the non-use of informants and/or undercover officers in order to mislead the Court into securing a wiretap order.

C. TRASH RUNS.

(1.) The State's claim.

Law enforcement official conducted only two trash runs, one at each location. A trash run was

conducted on February 7, 2006 at the McDowell address and one on February 16, 2006 at the Calle de la Luna address.

The trash run at the McDowell address revealed among other items, a brown vial with the label ripped off and some torn Christmas cards from 2003. Since the items were torn police concluded the occupants of the apartment were aware police collect garbage to identify persons involved in criminal activity.

At the Calle de la Luna address police found two cardboard boxes and a grocery bag with household garbage. There were no documents found which would identify the occupants.

(2.) Actual facts.

Used in combination with a pole camera, police would be able to not only know who placed garbage in each location but when. This is particularly important at the McDowell address since this is a community dumpster.

At the Calle de la Luna address each residence has a recycling bin and trash bin which is placed in front of each home for pickup on a date certain by city trucks. Using the pole camera, police could watch when each bin was placed in front of the Calle de la Luna address in order to examine the contents of more than just one "trash run."

D. GRAND JURY INVESTIGATIONS AND SEARCH WARRANTS.

(1.) State's claims.

Use of both the grand jury and search warrants would be ineffective because it would alert the targets and grand jurors would not believe the testimony of a drug trafficker.

(2.) Actual facts.

The claims made by the State are true of almost all similar drug investigations. Other than mere conclusions, Buscher and Bell fail to state with any specificity as to "why" in this particular investigation, ordinary means of investigations will fail. United States v. Robinson, 698 F.2d 488, 453 (D.C. Cir. 1983).

E. GLOBAL POSITIONG SYSTEM (GPS) TRACKING DEVICE.

(1.) State's claim.

Buscher and Bell claim the GPS device was highly successful to determine the locations frequented by Chuy. However, a wiretap is necessary in order fully utilize the GPS device to it full potential in meeting the goals of this investigation.

Regarding the Calle de la Luna address, police in nearly four months, only identified three vehicles associated with Barraza-Mendoza. One vehicle was sold and another was seen driven one time and the other was always parked in the garage.

(2.) Actual facts.

If the pole camera had been used at both locations police could have easily identified which vehicles were associated with targeted individuals and possible sources of narcotics.

V. CONCLUSION.

Defendants Gamboa-Molina and Mario Velasco-Felix request this Court set a hearing to establish that the intercepts were unlawfully obtained and therefore should be suppressed, as well as any fruits thereof.

Dated this 29th day of March, 2007.

/s/
Herman Alcanta , Jr., Esq.

Copies of the foregoing
delivered/faxed this 29th
of March, 2007, to:

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